No. 91-1600

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Courts below erred in sustaining Respondent's claim under the Age Discrimination in Employment Act, where the finding of age discrimination was based upon the logically irrelevant issue of pension vesting, and not upon considerations of age?

2. Whether the Court of Appeals erred in reinstating an award of liquidated damages that had been set aside by the District Court, where there was no evidence from which the jury could draw a reasonable inference that Hazen Paper Company's decision to discharge Biggins from employment was a "willful" violation of the Age Discrimination in Employment Act?

LIST OF PARTIES

The parties to the proceedings below were Respondent Walter F. Biggins and Petitioners Hazen Paper Company[1], Robert Hazen and Thomas N. Hazen.

[1] Hazen Paper Company is a private, closely held corporation organized under the laws of the Commonwealth of Massachusetts. The Company has no parent or subsidiary entities.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Bownes, Senior Judge) is reported at 953 F.2d 1405 (1st Cir. 1992), and is reprinted in the Appendix to the Petition for a Writ of Certiorari at pp. A-5 – A-49.

The Memorandum and Order of the United States District Court for the District of Massachusetts (Freedman, C.J.) has not been reported. It is reprinted in the Appendix to the Petition for a Writ of Certiorari at pp. A-50 – A-88.[2]

[2] The Petitioners' Petition for a Writ of Certiorari will hereinafter be referenced as "Cert. Pet." The parties' Joint Appendix will be referenced as "J.A." The Record Appendix used in the Court of Appeals below will be referenced as "[Vol. No.] R.A."

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was issued on January 8, 1992. Cross-petitions for rehearing were denied on January 29, 1992. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*, provides in material part as follows:

§ 623. *Prohibition of age discrimination*

(a) *Employer Practices.* It shall be unlawful for an employer — 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

§ 626. *Recordkeeping, investigation, and enforcement*

(b) *Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion.*

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum

wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter.

STATEMENT OF THE CASE

This case arises out of the termination of Respondent Walter F. Biggins' employment with Hazen Paper Company ("Hazen Paper" or the "Company") in June, 1986. Respondent was discharged from his position as Technical Director of Hazen Paper, a small family-owned business located in Holyoke, Massachusetts, following the Hazens' discovery that Biggins — contrary to prior assurances he had given them — was marketing to competitors of the Company services of the type he performed for Hazen Paper. Upon making this discovery, the Hazens asked Biggins to sign a confidentiality agreement as a condition of continuing employment with the Company. Respondent refused to sign the confidentiality agreement unless he received a guarantee of additional compensation in the form of increased salary and/or Company stock, and his employment was thereafter terminated. At the time of his discharge, Respondent was 62 years of age, and, since he had begun working for the Company at age 52, was several months shy of the ten years of service required to vest in the Hazen Paper pension plan.

In February, 1988, Biggins commenced an action in the United States District Court for the District of Massachusetts against the Company, its President, Robert Hazen, and its Treasurer, Thomas Hazen. In an amended complaint (J.A. 27-36), Respondent asserted among other claims that his discharge was the product of unlawful age bias, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*[3] The parties en-

[3] The amended complaint set forth additional federal and state law claims arising out of the termination of Biggins' employment, which claims are not the subject of review in this Court.

gaged in active discovery from February, 1988 through February, 1990. Following a denial of the defendants' motion for summary judgment, the case proceeded to trial.

Beginning July 16, 1990 and continuing for four successive days, the case was tried before a six-member jury. At trial, Respondent argued that the Petitioners' articulated reason for discharging him from employment — *viz.*, his refusal to sign a proffered confidentiality agreement following revelation of his previously undisclosed business dealings with Hazen Paper competitors — was pretextual, and that the Hazens' true motivation was to prevent his imminent vesting in the Company pension. At the close of plaintiff's case, Petitioners moved for a directed verdict, contending, *inter alia*, that the evidence did not permit a reasonable jury finding in favor of the plaintiff on his claim of age discrimination. (J.A. 188-91.) The court denied this motion without opinion. (J.A. 7.) At the conclusion of all the evidence, Petitioners renewed their motion for a directed verdict (J.A. 192), which motion was again denied. (J.A. 7.) On July 20, 1990, the jury heard closing arguments of counsel, received the judge's charge, and after deliberating just 3½ hours returned a verdict in favor of the Respondent. (J.A. 193-97.)

Responding to questions posed on a special verdict form, the jury found Hazen Paper liable under the ADEA for compensatory damages in the sum of $560,775.00. The jury also found the Petitioners' purported violation of the statute to have been "willful". (J.A. 193.) Accordingly, the District Court assessed an additional $560,775.00 in "liquidated damages" against the Company pursuant to Section 7(b) of the ADEA, 29 U.S.C. § 626(b) (J.A. 193; I R.A. 46-46C.)[4] On August 27, 1990, the clerk entered final judgment in favor of Respondent in the amount of $1,803,547.00, together with interest on his non-age discrimination claims in the amount of $196,641.35, for a

[4] The jury additionally awarded Respondent $100,000.00 for interference with his pension vesting in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 895, 29 U.S.C. § 1140, $266,897.00 for breach of contract (reversed on appeal), and $315,100.00 on certain state law tort claims. (J.A. 193-97.)

total award aggregating in excess of $2,000,000.00. (J.A. 198-99.)

Petitioners thereupon filed a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (J.A. 200), together with a motion to alter or amend the judgment for purposes of remitting the damages award. (I R.A. 48-49.) On April 5, 1991, the District Court issued a Memorandum and Order upholding the jury's finding of age discrimination liability against Hazen Paper under the ADEA. The court held that "the jury could reasonably have found that defendants knew of plaintiff's [soon-to-be-vested] status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights." (Cert. Pet. A-56.) However, after acknowledging that Biggins' proof of age discrimination was "a bit thin", the District Court held the evidence inadequate as a matter of law to sustain the jury's additional finding of willfulness, and struck the award of liquidated (double) damages previously assessed against Hazen Paper. (Cert. Pet. A-56 - A-62.)

On appeal, the First Circuit affirmed the judgment with respect to underlying ADEA liability, but reversed the lower court's entry of judgment n.o.v. against the jury's willfulness finding, thereby reinstating approximately $420,000 in liquidated damages.[5] Relying principally upon what it found to be a supportable inference that the Hazens' real reason for terminating Biggins' employment was to interfere with his pension vesting, the Court of Appeals held that a claim of age discrimination had been made out. In the penultimate paragraph of its discussion of Respondent's ADEA claim — the only section of the opinion addressing the sufficiency of the evidence to support a finding of age discrimination — the Court of Appeals reasoned that:

> "[T]he jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights

[5] The Court of Appeals had remitted Respondent's predicate ADEA damages by roughly $120,000.00, which remittitur in turn operated to reduce the liquidated damages award by an equivalent amount. (Cert. Pet. A-22 - A-23.)

vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years."

(Cert. Pet. A-14.)

In reinstating the jury's award of liquidated damages, the First Circuit reversed the District Court's ruling that evidence of age discrimination which was "thin", "sparse" and in large part "circumstantial" and "self-serving" (Cert. Pet. A-56, A-62) was legally insufficient to meet the higher threshold required for a "willful" violation of the ADEA. Notwithstanding its acknowledgment that several other circuit courts have articulated heightened standards for willfulness liability comparable to the one applied by the District Court below, the First Circuit adopted a contrary test for liquidated damages which has the effect of authorizing such damages in virtually *every* case where disparate treatment is found under the ADEA.[6]

Following issuance of the First Circuit's decision, both parties sought reconsideration through timely petitions for rehearing and suggestions for rehearing *en banc*.[7] On January 29, 1992, the Court of Appeals denied each of these cross-petitions. (Cert. Pet. A-1 – A-2.) On April 2, 1992, the Hazens filed a Petition for a Writ of Certiorari with this Court, seeking review of the Court of Appeals' rulings with respect to both predicate

[6] The January 8, 1992 decision of the First Circuit upheld the jury's willfulness finding by placing primary emphasis on Thomas Hazen's testimony that "he was 'absolutely' aware that age discrimination was illegal," and by concluding that such an acknowledgment "is as strong evidence of a knowing violation of ADEA as a plaintiff could wish." (Cert. Pet. A-20.)

[7] Biggins sought rehearing on the Court of Appeals' affirmance of the District Court's refusal to enhance his statutory attorney's fee ($175,564.75) to reflect the contingent nature of his legal representation. Following the First Circuit's denial of rehearing, Biggins petitioned this Court for certiorari (No. 91-1818) on the issue of his request for enhanced attorney's fees. That petition was denied on June 29, 1992.

ADEA liability and liquidated damages.[8] On June 22, 1992, this Court granted the Hazens' Petition for a Writ of Certiorari on each of the two questions presented therein.

STATEMENT OF FACTS[9]

The facts herein are set forth in considerable detail, because the legal arguments addressed to this Court are best developed in the context of a full exposition of the evidentiary record.

Background

Hazen Paper is a small, privately held company owned by two cousins in Holyoke, Massachusetts. Robert Hazen is the Company's President, Thomas Hazen its Treasurer. (J.A. 48, 144; III R.A. 816-17.) Hazen Paper is what is known as a paper converter, and is engaged in the business of manufacturing coated, foil laminated and printed paper and paperboard for use in such products as cosmetic wrap, lottery tickets and pressure sensitive materials. (III R.A. 659-64.) An accountant retained by Respondent estimated the Company's pre-trial book value at just over $8 million. (II R.A. 579.)

Hazen Paper hired Biggins in 1977. Biggins was 52 years of age at the time. (J.A. 47; II R.A. 417.) Biggins had no written contract of employment, but served the Company in the position of Technical Director until June, 1986. (J.A. 47, 88; IV R.A. 917.) Biggins' principal duties as Technical Director were to ensure that Hazen Paper satisfied the technical requirements for production of the various products manufactured by the Company. Specifically included in Biggins' formal job description were, among other responsibilities, the following:

[8] The National Association of Manufacturers and Associated Industries of Massachusetts filed a joint brief as *amici curiae* in support of this petition.

[9] The following statement of facts accepts the plaintiff's evidence below as true, and supplements such evidence with those portions of the defendants' testimony that were neither impeached nor substantively contradicted at trial.

- "Working with Management Sales, Customers and Vendors [to] develop new or revised products to fill more completely existing customer needs or to fill new requirements. This may be as simple as matching a new color or as complex as using new materials on new equipment to make an entirely new product";
- "Working with Production Manager and Plant Superintendent, aggressively seek[ing] means to improve existing production methods and processes with particular emphasis on chemical aspects of these improvements";
- Maintaining company compliance with state and federal regulations in the area of pollution control;
- Development and implementation of plant safety rules, processes and procedures for the safe handling of chemicals at Hazen Paper; and
- Service on Hazen Paper's five-member Executive Committee.[10]

(J.A. 47; II R.A. 417-19; V R.A. 1132.)

Biggins acknowledged that part of his job at Hazen Paper was "product development", and that at some point during his employment he became involved in developing paper coatings and inks at the Company. (J.A. 51-52.) In particular, Biggins testified that he pioneered the development of a new water-based coating, designed to eliminate hazardous emissions from the nitrocellulose and vinyl coatings generally used in the paper industry. (J.A. 52-53.) Through a series of testing procedures carried out in the early 1980's, Biggins succeeded in developing a water-based paper coating that both exceeded the requirements of applicable environmental laws, and constituted a superior product for ultimate customers in terms of gloss and durability. (J.A. 54-59.)

Thomas Hazen became aware of Biggins' work in developing a water-based paper coating (J.A. 54), and Biggins presented

[10] The Executive Committee is the body at Hazen Paper charged with responsibility for the Company's major policymaking. (J.A. 144.)

Mr. Hazen with the product sometime in March of 1980. (J.A. 59.) In the spring of 1980, Hazen Paper began to use the water-based coating on some of its products; and by the mid-1980's, the coating — referred to by Respondent throughout the trial as the "Biggins Acrylic" — enjoyed wide application in the Company's manufacturing. (J.A. 60-61.)

In the period that followed Biggins' development of the water-based coating, Hazen Paper product sales increased substantially. (J.A. 63-67, 167.) Biggins acknowledged that, after developing and marketing the water-based acrylic for Hazen Paper, and while still employed by Hazen Paper, he personally received offers from vendors looking to distribute the product overseas. Biggins, however, responded by stating that "it was completely unethical and [he] wouldn't do it." (J.A. 68.)

The Hazens' Alleged Promise of Company Stock

In 1983, Biggins' salary at Hazen Paper was approximately $30,000 per year, exclusive of bonus. Respondent, however, testified that he was extremely unhappy with this level of compensation. Biggins stated that as a member of the Executive Committee, he had access to the Company's profitability figures and salary data; that he was aware that an independent sales representative named Robert Hutchinson was earning "hundreds of thousands of dollars" selling the very product he had developed; and that, as a result, he "became annoyed".[11] (J.A. 71-72.) At trial, Mr. Hutchinson confirmed that Biggins complained to him about his salary level (J.A. 127-28), and Robert Hazen likewise testified without contradiction that Biggins "talked about how underpaid he was very, very often." (J.A. 134.)[12]

[11] Mr. Hutchinson was an independent sales representative, absorbed his own business expenses, and was paid on a commission basis rather than as an employee of Hazen Paper. Mr. Hutchinson was also several years older than Respondent." (J.A. 117-20.)

[12] Another Hazen Paper employee, Gail Calvanese, similarly testified that Respondent complained "many times" that salesmen such as Mr. Hutchinson "were making money off his coating." (III R.A. 741-42.)

Sometime in 1983, and as a result of his stated dissatisfaction with his compensation, Biggins arranged a meeting with Thomas and Robert Hazen. During this meeting, Biggins stressed the contributions he had made to the Company's business (including development of the water-based acrylic), compared his salary with Robert Hutchinson's, and was at that time given a 10% salary increase. (J.A. 71-72, 100.)

In 1984, Respondent received another 8% salary increase, but was again dissatisfied with his level of compensation. Biggins testified that he objected to the fact that a salesman such as Mr. Hutchinson was increasing his earnings at a more rapid rate than he, and resolved that he would confront Thomas Hazen with his grievance. (J.A. 72.) Accordingly, in July, 1984, Biggins approached Mr. Hazen and stated that he "wanted to discuss something that was bothering [him] greatly." Biggins then proceeded to complain to Mr. Hazen that he "had to keep begging for money and getting measly increases, while Mr. Hutchinson's commissions were rising dramatically." Biggins further stated that "[he] thought [he] was worth a hundred thousand dollars minimum." (J.A. 72-73, 100.)

Thomas Hazen replied to Respondent's complaint by informing Biggins that he could not give him such a large salary increase, as no one at the Company — including himself and Robert Hazen — earned that level of compensation. (J.A. 73.) According to Respondent, however, Thomas Hazen did state that "he would be willing to give [him] a piece of the Company in stock", in an amount sufficient to make up the difference between his $44,000 per year salary and the $100,000 compensation Biggins believed he deserved. (J.A. 73, 101.) According to Respondent's testimony, Mr. Hazen also stated that "he would have to talk with his accountants and his lawyers and work out a plan," and further cautioned that Biggins would in turn be required to sign over to Hazen Paper any rights he might claim in the water-based coating. (J.A. 73, 102.)

At trial, Thomas Hazen clarified the context of Respondent's ambiguous reference to a plan to be worked out by Company

lawyers and accountants. Mr. Hazen testified that he had informed Biggins during their mid-year meeting that Hazen Paper was considering implementation of a stock appreciation rights or phantom stock option plan for a limited number of key employees, but that the plan was still in the discussion stages with the Company's accountants and attorneys. (J.A. 145-46, 162.)[13] Respondent did not contradict this amplification of Mr. Hazen's remarks during rebuttal testimony.

Approximately one year passed before Biggins reminded Thomas Hazen about the purportedly promised stock, at which time Mr. Hazen responded that "he was having some legal problems with it and it was in the hands of the lawyers." (J.A. 74, 102-03.) Thereafter, in December, 1985, Thomas Hazen congratulated Biggins on his achievement in developing another product that was to prove lucrative for the Company. In response, Biggins stated, "Thank you much for the compliment, where's my stock[?] I'm getting impatient. You promised me that in 1984, and I still haven't seen it. Don't give me congratulations, give me part of the company." To this, Mr. Hazen simply replied, "Oh, I got to take that down and dust it off." There was no evidence of any further discussion between Biggins and the Hazens about allegedly promised stock prior to their meeting of May 24, 1986 concerning a proposed confidentiality agreement. (J.A. 76-77, 103-04.)

By 1985, Biggins was the fourth highest paid employee at the Company — trailing only the Company's two owners (Thomas and Robert Hazen), and an older, 20-year employee by the name of Malcolm Gezner. (J.A. 134.) Nevertheless, Biggins made frequent requests for more money, and Robert Hazen grew impatient with him as a result. (J.A. 135.) Following the December, 1985 conversation with Thomas Hazen in which Biggins renewed his demand for Hazen Paper stock, Respondent testified that he "noticed a distinct change in their

[13] Robert Hazen likewise testified that he and his cousin Thomas discussed the possibility of setting up a stock appreciation rights plan for employees, but that he was personally opposed to the idea. (IV R.A. 872-73, 884-86.)

[Thomas and Robert Hazen's] attitude towards [him]." Biggins testified that, following their confrontation concerning the stock issue, he and Robert Hazen ceased sitting together when they travelled by airplane on business, and that he and Thomas Hazen suddenly discontinued their practice of having weekly meetings. (J.A. 77-78.)

Respondent's Undisclosed Business Dealings With Company Competitors

In 1983, Respondent established his son Timothy in a business called "Proclaimation, Inc." Proclaimation was a company engaged in the business of cleaning up hazardous wastes and recovering dirty solvents generated by automobile shops and paper companies. Although Hazen Paper was not commercially engaged in such a business, Biggins testified that he personally performed similar services for the Company in his capacity as Technical Director. (J.A. 94-95, 110-11.)

The undisputed evidence at trial established that Biggins affirmatively sought to keep Proclaimation's business confidential, and not to disclose it to the Hazens. At the time Biggins founded Proclaimation, he confided to an independent sales representative about the business and specifically instructed him to "keep it in confidence." (J.A. 121.) Likewise, Thomas Hazen testified — *without contradiction* — that while Respondent had informed him prior to 1986 that he would be setting his son up in a business to dispose of waste materials from small auto body shops and garages, Biggins had assured him that neither he nor his son would be doing work for Hazen Paper competitors. Thomas Hazen explicitly voiced his objection to Biggins using expertise he had developed at Hazen Paper for the benefit of competitors, and expressed the view to Respondent that such activity would be "totally inappropriate." (J.A. 146-47.) Robert Hazen similarly testified that Biggins had given assurances that Proclaimation would not be doing business with Hazen Paper competitors. (J.A. 135-36.) Significantly, while Biggins testified that he had informed Thomas Hazen about

Proclaimation when he started the venture and that Mr. Hazen had voiced no objection (J.A. 80, 95), Respondent nonetheless conceded that he *never* told Mr. Hazen that Proclaimation would be performing services for Hazen Paper competitors. (J.A. 113.)

Having advised the Hazens that Proclaimation would perform no work for Company competitors, and having instructed another individual to keep his involvement with the venture in confidence, Respondent acknowledged at trial that Proclaimation did, in fact, engage in work for competitors of his employer. (J.A. 96, 110-11.) Biggins testified, for example, that he personally facilitated a lunchtime introduction where his son made a sales proposal to a Hazen Paper competitor. (J.A. 110-12.) Respondent additionally testified that he transmitted letters over his own signature to Hazen Paper competitors, for the purpose of soliciting business on behalf of Proclaimation. (J.A. 113-14.)[14]

Sometime after the summer of 1985, Biggins started up a new consulting business in the environmental/regulatory compliance area. Respondent's testimony was that he told Thomas Hazen of the "existence" of this venture in 1985, and that he was attempting to help his son Timothy. (J.A. 79-80, 97.) Thomas Hazen's uncontradicted testimony was that when he asked Biggins if he were personally involved with the consulting firm, Biggins stated "Oh, no, it's my son's business." (J.A. 149.) Asked at trial if he ever informed Mr. Hazen that the consulting business he had supposedly started for his son would be working with Hazen Paper competitors, again Respondent testified that he had not. (J.A. 113.)[15]

The undisputed evidence presented to the jury thus made plain that Biggins never informed the Hazens that he was per-

[14] Respondent's admissions in this regard were further confirmed by testimony from certain Hazen Paper competitors themselves. *See, e.g.*, testimony of Roger Sullivan (J.A. 128-29) (describing Proclaimation service proposal made by Biggins during 1984 meeting).

[15] Revealingly, and in response to a question from the trial judge, Respondent testified that he understood that he could not properly "work for anyone else on the outside" while he was employed at Hazen Paper. (J.A. 83.)

sonally going to be working on behalf of an outside venture, or that such venture would be doing business with Company competitors. In point of fact, however, the company established by plaintiff was *named* "W.F. Biggins Associates, Inc.", and was set up to provide small and medium-size businesses with the same kinds of environmental advisory services on a consulting basis that Biggins himself had been providing to Hazen Paper as Technical Director. (J.A. 96-97, 105-07.)

At the time he organized W.F. Biggins Associates, Respondent and his son Timothy prepared a brochure to use in connection with firm marketing. Emphasizing the important role of Biggins in the new company's business, the brochure identified the firm as "W.F. Biggins Associates, Inc.", and nowhere even made reference to Respondent's son Timothy. (J.A. 104-05, 183-84; III R.A. 696.) Likewise, in a Dun & Bradstreet report prepared for W.F. Biggins Associates, the company listed Respondent alone as its founder, chief executive officer and director. Timothy Biggins' name appeared nowhere in the report. (J.A. 105, 185-87; III R.A. 696.) Finally, and again contrary to Respondent's representations to the Hazens, the evidence at trial showed that W.F. Biggins Associates was, indeed, performing services for Hazen Paper competitors, and that Biggins was himself *personally* involved in soliciting business from these competitors on behalf of W.F. Biggins Associates. (J.A. 98, 107-09, 128-29, 137-38, 150-51; IV R.A. *passim*.)

The first time that Thomas or Robert Hazen had any idea that Biggins was, contrary to his prior assurances, marketing consulting services with his son to competitors through "W.F. Biggins Associates" was in late April, 1986, when an independent contractor named Donald MacMeekin showed Thomas Hazen the W.F. Biggins Associates brochure he had received. (J.A. 148, 163.) The Hazens confirmed Biggins' personal involvement in the consulting venture sometime toward the middle of May, 1986, after having a lengthy telephone conversation with Roger Sullivan — one of the very Hazen Paper competitors whom Biggins had solicited. (J.A. 130-31, 150-51.)

Both Thomas and Robert Hazen testified that they were taken aback by this discovery, that they were embarrassed by it, and that they felt betrayed. (J.A. 136-39, 148.)

Respondent's Discharge From Employment

The Hazens' discovery of Respondent's outside consulting activities on behalf of competitors led them to confront Biggins directly. Shortly after being shown the brochure for W.F. Biggins Associates, Thomas Hazen met with Biggins in his office. At this meeting, Mr. Hazen told Biggins that he was aware that W.F. Biggins Associates was *his* business rather than his son's, and that the apparent conflict of interest was "totally unsatisfactory." (J.A. 148.) Mr. Hazen further stated that he was going to continue investigating the matter, and would then decide what the Company would do. (J.A. 151.)

On May 24, 1986, Thomas and Robert Hazen met with Biggins to discuss a resolution of their dispute. At this meeting, the Hazens presented Biggins with evidence that he was marketing services to competitors at the expense of Hazen Paper, and informed him that it had to stop: "You can't be working for our competitors and working for the Hazen Paper Company at the same time." (J.A. 138-39.) The Hazens stated, in no uncertain terms, that they found Biggins' conduct "outrageous," and informed Respondent that he would have to sign a confidentiality agreement if he wanted to remain in their employ. (J.A. 151-52.) Respondent testified to these facts as well. (J.A. 78-79.)

The Hazens indicated to Biggins at their meeting of May 24 that they would draw up an employment contract of some type. Shortly thereafter, on June 3, 1986, Thomas and Robert Hazen provided Biggins with a proposed Employee Confidentiality Agreement. Accompanying the Agreement was a cover memorandum that stated as follows:

> "Per our discussion, please review and sign the attached agreement. We'd like to have this back by or before June 9.

> We cannot tolerate the kind of outside activity in areas directly relating to the business of Hazen Paper Company that you have been involved in for several years. We regard it as unethical and completely unacceptable. We trust that the agreement attached spells out clearly what we expect and that you will abide by it completely while carrying out the regular duties and responsibilities of the job of Technical Director.
>
> With respect to the practical matter of disassociating from your consulting firm, we expect you to accomplish this by September 1. Specifically, we expect you to change the name of the firm, relinquish your ownership and control of the firm, and remove yourself from any duties of or responsibilities to the firm."

(J.A. 80-81, 139, 168-71.)

Respondent acknowledged that signing the proffered Employee Confidentiality Agreement was an express condition of his continued employment at Hazen Paper. (J.A. 81.) The draft agreement given to Biggins on June 3, 1986 included the following six restrictions:

- Biggins was required to report all discoveries and inventions made by Biggins during the course and within the scope of his employment at Hazen Paper, whereupon such discoveries and inventions would become the exclusive property of the Company;
- Biggins covenanted to protect all Hazen Paper trade secrets and confidential information, and not to use or disclose such information in any capacity without express written authorization from Hazen Paper;
- Biggins agreed to execute any documents that Hazen Paper might deem necessary to protect the Company's interest in its discoveries and inventions;
- Biggins agreed to disclose all patent applications and copyrightable material not subject to the Employee Confidentiality Agreement;

- Biggins covenanted "to devote his full time and best efforts to the business of the company and agree[d] not to take any other job either as an employee or a consultant of another business during the time of his employment with Hazen without Hazen's prior written permission." In this regard, the Agreement further provided that "[p]ermission will not be granted if Hazen, in its sole discretion, determines that such other employment creates a conflict or potential conflict of interest with Hazen's present or future business"; and finally,
- Biggins covenanted that he would not engage in a business that competed with Hazen Paper for a period of two years following the termination of his employment at the Company. (J.A. 83, 169-71; V R.A. 1138.)

On June 10, 1986, after reviewing the matter with his personal attorney, Biggins met with Thomas Hazen to discuss the Employee Confidentiality Agreement. At this meeting, Biggins informed Mr. Hazen that he had "no problem" with the Agreement as drafted, but that he would only sign it if it were accompanied by a "companion agreement" defining his rights to salary and Company stock. Mr. Hazen responded by stating that he would not accede to any additional agreements, and that if Biggins did not sign an employee confidentiality agreement the parties would have to sever their relationship. (J.A. 86-87.)

Thereafter, Biggins gave no indication to Thomas Hazen that he was willing to sign the confidentiality agreement as tendered, and indeed seemed more interested in going into the consulting business with his son. Accordingly, Mr. Hazen telephoned Biggins and offered him — in lieu of terminating his relationship with Hazen Paper altogether — the option of working for the Company as an outside consultant. Specifically, Mr. Hazen:

> "suggested that [they] try and work out a separation agreement, *which would cover things like his pension rights; perhaps a pay plan for a temporary basis to ease him through, and other benefits*, and would have dealt with things like the unemployment insurance, that we would work out such a separation agreement. *And that we also would work out some kind of a deal where he could do this kind of consulting for us.*
>
> We could have used him on a retainer basis. Would have gotten him out of a highly confidential area for us; at the same time it seemed it would be in the interest of both parties to work out an amicable arrangement."

(J.A. 153-54)(emphasis added).

At the time Thomas Hazen made the foregoing offer to Biggins, various other persons performed services for the Company as independent contractors rather than as employees, including the Company's attorneys. Although Respondent claimed below that Mr. Hazen's proposed consulting arrangement meant that he would no longer be a Hazen Paper employee, Biggins had in fact never expressed any interest in such an arrangement. Accordingly, the parties did not discuss what effect, if any, the proposed consultancy would have on Biggins' pension and other benefits. (J.A. 87-88, 160-61.) Again, however, Mr. Hazen testified without contradiction or impeachment that he suggested to Biggins that they forge a separation agreement that would *cover* Biggins' pension and related benefits, but that Biggins was not interested in pursuing such an option. (J.A. 153-54.)

On June 13, 1986, Thomas Hazen met with Biggins at Hazen Paper. At this meeting, Biggins reiterated that he would be willing to sign the Employee Confidentiality Agreement, but that he "had to have the financial agreement as well." Mr. Hazen replied that there would be no such changes to the Agreement, and that if Biggins refused to sign it his employment would be terminated. (J.A. 87-88.) When Biggins refused to sign the Employee Confidentiality Agreement, Mr. Hazen requested him to leave the building and his employment was terminated. (J.A. 88.)

The Alleged Evidence of Age Discrimination

Respondent's affirmative evidence of age discrimination was, as the District Court correctly observed, "thin" to say the very least. During the entire course of his trial testimony — in which Biggins described close to ten years of employment at Hazen Paper — Respondent referred to just two isolated remarks purportedly made by Thomas and Robert Hazen that in any way concerned his age. According to Biggins, Thomas Hazen once stated, at some indeterminate time after he had provided members of the Executive Committee with life insurance policies, that "it was costing him a lot more for [Biggins'] policy because [he] was so old." (J.A. 99.) In addition, Respondent testified that, sometime in 1985, Robert Hazen joked that Biggins' Company-sponsored membership in a handball court in Holyoke "wouldn't do [him and fellow executive Malcolm Gezner] much good because [they] were so old." (J.A. 99.)

Beyond the above evidentiary fragments, Respondent presented no affirmative evidence of age bias that was in any way probative of his ADEA claim. Biggins introduced no additional evidence of age-biased remarks by anyone at Hazen Paper, nor did he proffer statistical evidence of any kind suggesting age discrimination in Hazen Paper's employment practices. Likewise, Respondent made no demonstration of the existence of discriminatory corporate policies at Hazen Paper; nor did Biggins present evidence of any invidious pattern of age-related discharges or forced early retirements at the Company.

Excepting the two isolated quips which referred to age, the courts below rested their finding of discrimination entirely on evidence suggesting an intent by the Hazens to prevent Biggins' pension rights from vesting. In this regard, Respondent introduced evidence establishing that Thomas Hazen was the Company executive responsible for administering Hazen Paper's retirement plan (J.A. 156); that Mr. Hazen received pension account documents describing the pension status of individual employees (J.A. 157); and that, at the time of his discharge, Biggins was eight months shy of the pension plan's

ten-year vesting requirement. (J.A. 115, 157.)[16] Respondent, however, presented no evidence — beyond the implication that Thomas Hazen had knowledge that Biggins' discharge would cause him to lose pension benefits — that would suggest the Hazens were specifically motivated to interfere with Biggins' pension vesting. More critically, the undisputed evidence at trial was that employees at Hazen Paper vest in the Company's pension plan after ten full years of credited service, and that (with an exception for those who reach their normal retirement date) an employee's age is of *no* consequence to this vesting schedule. (J.A. 156-58, 182.)

SUMMARY OF ARGUMENT

This is a case where the double-damage remedy for a "willful" violation of the ADEA is wholly unjustified, and the Court below erred in the legal standard it applied to reinstate such punitive damages. Indeed, even predicate ADEA liability is without proper basis, depending as it does upon an inference both legally and logically insupportable, *i.e.*, that an intention to prevent an employee's pension vesting is, without more, evidence of age discrimination. On the basis of manifestly mistaken views of the law, double liability was imposed against Petitioners where there should have been none at all.[17]

There was no probative evidence permitting the jury to find an ADEA violation in this case. Beyond the mere suggestion that Petitioners knew Biggins' pension benefits would vest in a period of months, there was no evidence that the Hazens in fact discharged Biggins for the specific purpose of depriving him of those benefits. Even if there were such evidence, however, in-

[16] For his part, Thomas Hazen testified that he relied heavily upon an outside consulting firm to attend to administration of the Company's pension plan, and further indicated that in 1986 he was not even aware of the plan's particular vesting schedule. (J.A. 156-57, 163-64.)

[17] As a matter of orderly presentation, and because it illuminates Petitioners' position concerning liquidated damages, this Brief will first argue that predicate liability against the Hazens rests upon an illegitimate legal and evidentiary foundation, and will then address the erroneous standard applied by the Court of Appeals to award double damages.

terference with an employee's service-based pension vesting does not itself constitute a violation of the ADEA.

Denial of pension benefits is not logically equivalent to discrimination on the basis of age. Where, as here, an employer's pension plan provides that benefits will vest after ten years of service, employees both within and outside the protected class are equally eligible for vesting. Only the happenstance that Biggins was originally hired at the age of 52, a fact tending to negate an inference of age discrimination, resulted in his pension vesting at the more advanced age of 62. Thus, on the facts of this case, it was error for the Court of Appeals to equate interference with Biggins' pension vesting with age discrimination.

The ADEA's language, legislative history and overall structure confirm that Congress intended the statute to reach employment decisions affected by general age bias and prejudice, not to govern broader categories of personnel decisionmaking that might involve age "surrogates" such as seniority or pension status. Moreover, interference with employee pension rights is explicitly prohibited by ERISA, a statute enacted after the ADEA. Construing the ADEA to extend to pension interference permits circumvention of the enforcement scheme Congress incorporated in ERISA, a result contrary to both clear Congressional intent and prior decisions of this Court.

Even if the evidence somehow allowed for a predicate finding of age discrimination, the record will not support an inference that the Hazens' violation of ADEA was "willful" within the meaning of Section 7(b) of the Act. The District Court's entry of judgment notwithstanding the verdict on the award of liquidated damages was thus clearly correct.

As this Court recognized in *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), Congress intended liquidated damages to be "punitive in nature" and available only in a limited number of cases. To achieve this purpose in an individual discriminatory treatment case such as the present one, a plaintiff must show ***both*** that the employer knew or showed reckless disregard for whether its conduct violated the ADEA, and further that the employer's actions were repeated, were without

colorable justification, or were otherwise oppressive or outrageous in character. To apply the less rigorous standard of willfulness adopted by the Court of Appeals below would lead to liquidated damages being awarded in virtually every discriminatory treatment case, a result contrary to the explicit Congressional intent identified by this Court in *Thurston*.

In the instant case, there was no probative evidence that Petitioners committed any violation of the ADEA at all, much less that their violation was "willful" within the meaning of Section 7(b). The Hazens simply required Biggins to sign a confidentiality/non-competition agreement after discovering that he had been marketing business services to Company competitors. When Biggins refused to sign the agreement without a guarantee of additional compensation, he was discharged from employment. Such conduct by the Hazens was neither harsh, outrageous nor otherwise without colorable justification. Further, even if the evidence permitted the inference that Biggins' discharge was motivated by a desire to defeat his pension vesting, there was no basis in the record for finding that Petitioners knew or showed reckless disregard for whether such conduct violated the ADEA. For these reasons, and irrespective of whether or not the facts adduced at trial can sustain a finding of predicate ADEA liability, the evidence is legally insufficient to meet the higher threshold required to establish a "willful" violation of the statute.

ARGUMENT

Petitioners in this case are entitled to judgment as a matter of law. The evidence at trial — when viewed in the light most favorable to Respondent — permits no reasonable inference that the Hazens committed either an ordinary or willful violation of the ADEA.

I. The Jury's ADEA Verdict Is Unsupported By The Evidence And Erroneous As A Matter Of Law

The ADEA provides that it shall be unlawful for an employer to discharge or otherwise discriminate against an employee "because of . . . age." 29 U.S.C. § 623(a). To prove discrimination because of age, a plaintiff must introduce evidence from which a reasonable jury could conclude, in light of common experience, that it was more likely than not that the employer's adverse action was motivated by consideration of the plaintiff's age. *See Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-80 (1978) (showing violation of Title VII of Civil Rights Act of 1964 requires "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations"); *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) ("The factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff") (quotations omitted); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802-05 (1973) (plaintiff's burden under Title VII is to demonstrate that defendant's proffered explanation for an adverse employment action is more likely than not a pretext for discrimination).[18] In this case, the evidence presented at trial permits no rational inference that Biggins was more likely than not discharged from employment because of intentional discrimination based on age.

A. The Finding That Petitioners Discharged Biggins In Order To Defeat His Pension Vesting Is Both Unsupported By The Evidence And Immaterial To Respondent's Claim of Age Discrimination

The linchpin of the Court of Appeals' analysis in upholding age discrimination liability against Petitioners was its assertion

[18] Congress designed the ADEA's discrimination prohibitions to parallel those found in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* *See Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978). Accordingly, principles of construction under Title VII are routinely applied in ADEA cases. *See Oscar Meyer Co.* v. *Evans*, 441 U.S. 750, 755-58 (1979) (noting that, where provisions of ADEA are virtually *in haec verba* with Title VII, construction of ADEA in accordance with interpretations under Title VII serves Congressional intent). *See generally* 3A Larson, *Employment Discrimination* § 102.41 (1992).

that the jury could properly have concluded the Hazens were motivated by a desire to defeat Biggins' pension vesting — and that the imposition of a confidentiality agreement was simply a pretextual means to that end. The First Circuit reasoned that "age was inextricably intertwined with the decision to fire Biggins," because "[i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." *See* Cert. Pet. A-14.[19] This conclusion rests not only upon an inadequate evidentiary foundation, but as well upon a logical error that is fatal to its reasoning.

1. The Evidence Permits No Reasonable Inference That The Hazens Dismissed Biggins From Employment In Order To Prevent His Pension Rights From Vesting

Against the overwhelming weight of evidence that Petitioners discharged Respondent from employment because of his refusal to sign a confidentiality agreement, tendered to him immediately following the Hazens' discovery that Biggins had been soliciting Company competitors on behalf of an outside business venture, the District Court and First Circuit held the jury could have found this reason to be a pretext masking an intent to interfere with Biggins' pension vesting. This inference, however, is completely unsupported by the evidence of record.

The only evidence at trial that in any way concerned Respondent's pension rights was the suggestion that Thomas Hazen arguably had knowledge at the time he terminated Biggins' employment that Respondent was eight months shy of satisfying the pension plan's ten-year vesting requirement. *See* Cert. Pet.

[19] The District Court placed similar emphasis on this inference as a basis for ADEA liability, observing that "the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights." *See* Cert. Pet. A-56.

A-55 – A-56, A-63 – A-64.[20] This evidence is insufficient to bear the weight of Respondent's claim. Even if the jury could conceivably have found that Thomas Hazen was *aware* of Respondent's pension status at the time he discharged Biggins from employment, such knowledge cannot, standing alone, give rise to a proper inference that Mr. Hazen was *motivated* by that knowledge in his decisions concerning Biggins.

In *Visser* v. *Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991) *(en banc)*, the Seventh Circuit (Posner, J.) affirmed summary judgment in favor of the employer in an ADEA case for precisely this reason. In so ruling, the court stated:

> "It is true that as chief executive officer and a former trustee of the pension fund Packer almost certainly knew that Visser was near to full vesting; and so we shall assume. ***But a trier of fact may not infer action from knowledge alone. Otherwise every worker who lost his job within months, or perhaps years, before the full vesting of his pension would have a prima facie case of age discrimination.*** Visser's age, the fact that he incurred a loss of pension benefits when he was fired, the fact that he was replaced by a much younger man, the fact that he may have been fired for an unethical reason unrelated to his age — none of these facts is evidence of age discrimination. The first three merely place Visser within the protected class and establish injury, and the last is evidence *against* age discrimi-

[20] As noted *supra*, however, Mr. Hazen testified without contradiction that he relied heavily upon an outside consulting firm to handle the administrative details of the Company's pension, and even indicated that he was *not* in fact aware of the plan's ten-year vesting schedule when he discharged Biggins from employment in 1986. Indeed, as the District Court itself pointed out, Mr. Hazen appeared to be under the impression that Biggins had *already* achieved full vesting under the plan, *see* Cert. Pet. A-63 n.4, a fact that obviously belies an intent on his part to interfere with Respondent's pension rights. More critically, on appeal to the First Circuit, Respondent *himself* took the position that he was in fact already vested in the Company pension at the time of his dismissal from Hazen Paper. *See* Brief of Plaintiff-Appellee/Cross-Appellant Walter F. Biggins, at p. 16 ("In fact, at trial it became apparent that, despite the defendants' position, Biggins really had been vested all along because of a bonus year's credit that was given to employees after five years of service").

nation. The only evidence *of* age discrimination is — what we have just said is not enough — Packer's knowledge of Visser's age and pension rights."

Visser, 924 F.2d at 658-59 (emphasis added).

It is plain from the unassailable logic of *Visser* that, even assuming Thomas Hazen had actual knowledge of Respondent's pension status at the time he presented him with the proposed confidentiality agreement, such knowledge cannot by itself sustain an inference that Mr. Hazen proposed the agreement in order to deprive Biggins of his pension rights. This is particularly true in light of the strong evidence of record showing that the timing of Thomas Hazen's action was precipitated not by Biggins' impending pension eligibility, but by Mr. Hazen's discovery of Respondent's distribution of brochures to competitors advertising the services of W.F. Biggins Associates.[21]

Apparently recognizing this defect in its analysis, the District Court noted that further evidence of age discrimination could be found in Mr. Hazen's offer of a consultancy arrangement to Respondent as an alternative to signing the confidentiality agreement. From this the District Court reasoned, and the First Circuit apparently accepted, that the true motive for Mr. Hazen's actions was to cut off Biggins' pension rights, and not to persuade him to sign the confidentiality agreement. Such reasoning, however, cannot withstand scrutiny.

First, there was no evidence that Respondent would be performing the same duties — or have the same access to confidential information — under the proposed consultancy arrangement as he had enjoyed as Technical Director.[22] Furthermore,

[21] The principle that knowledge of an employee's pension status at the time of a discharge decision will not, without more, permit an inference that the discharge was *motivated* by a desire to defeat pension vesting finds additional support in settled judicial interpretations of Section 510 of ERISA, 29 U.S.C. § 1140. *See Hendricks* v. *Edgewater Steel Co.*, 898 F.2d 385, 389-90 (2d Cir. 1990); *Corum* v. *Farm Credit Services*, 628 F. Supp. 707, 717 (D. Minn. 1986); *Donohue* v. *Custom Management Corp.*, 634 F. Supp. 1190, 1197 (W.D. Pa. 1986).

[22] Indeed, Thomas Hazen testified that his objective was to work out an amicable separation arrangement that would have removed Biggins from a highly confidential area at Hazen Paper, while allowing both Biggins and the Company to continue meeting their respective employment needs. (J.A. 153-54.) It also bears noting that retention of Biggins as an outside consultant would likewise have removed Biggins from his position on the Hazen Paper Executive Committee — the Company's highest level of policymaking authority.

there was *no* evidence that the consultancy being suggested by Thomas Hazen would have eliminated Respondent's pension rights. To the contrary, Mr. Hazen testified specifically and without contradiction that any agreement with Respondent would have provided for his pension benefits, and that he had so informed Biggins. While Biggins introduced evidence that the Company employed certain other outside parties as independent contractors (*e.g.*, its lawyers) without granting them pension benefits, he did not — and could not — say that the arrangement being proposed for him would not have included such benefits. Biggins and Mr. Hazen simply never discussed the matter one way or the other. Hence, there was no basis — short of abject speculation and conjecture — for the jury to conclude that the proffered consultancy somehow suggested an attempt by the Hazens to deprive Biggins of his pension. *See Galloway* v. *United States*, 319 U.S. 372, 395 (1943) (when evaluating sufficiency of the evidence for directed verdict purposes, "mere speculation [is] not allowed to do duty for probative facts"); *Gray* v. *New England Telephone & Telegraph Co.*, 792 F.2d 251, 255 (1st Cir. 1986) ("plaintiff cannot make inferences from facts which do not appear in the record").

2. Interference With Pension Vesting Does Not Constitute Age Discrimination

Even if the evidence allowed for the conclusion drawn by the courts below, *viz.*, that Petitioners were motivated in their actions toward Biggins by a desire to prevent his vesting in the Hazen Paper pension, such an inference provides no basis for ADEA liability as a matter of law. The First Circuit effectively equated age and pension status by assuming that "age was inextricably intertwined with the decision to fire Biggins," because

"[i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." *See* Cert. Pet. A-14. From this unsubstantiated assumption, the Court of Appeals held that a decision to discharge Biggins intended to thwart pension vesting was tantamount to age discrimination. *Id.* Resting as it does upon a presumed connection between age and pension eligibility which — on the record of this case — does not exist, the First Circuit's reasoning is fundamentally flawed.

a. There Is No Connection Between Service-Based Pension Status And Age

The Court of Appeals' formulation that pension status is "inextricably intertwined" with age displays a serious deficit of analysis and proves too much. As set forth in the argument which follows, service-based pension vesting is a matter wholly independent of age. If the Court of Appeals is suggesting that an age discrimination claim is made out any time an older worker is discharged before his pension rights can vest, then the court is simply wrong. Such reasoning would create a species of tenure for employees over age 40 which was never envisioned by Congress. The undisputed evidence at trial was that employees at Hazen Paper vested in the Company's pension plan after ten full years of service. Thus, an employee hired at age 19 vested at age 29, an employee hired at age 29 vested at age 39, and so on. Only the pure *happenstance* of plaintiff's being hired at age 52 — ironically a fact tending to *negate* an inference of age discrimination[23] — resulted in his pension vesting at the more advanced age of 62. In these circumstances, it was manifest error for the Court of Appeals to equate an employment decision based on pension status with age discrimination; for the two have nothing to do with one another.[24]

[23] *See Menard* v. *First Security Services Corp.*, 848 F.2d 281, 289 n.4 (1st Cir. 1988) ("We note that [plaintiff] when hired was already age 52, making it seem less likely that his discharge three years later was based on company prejudice against older people").

The First Circuit's ruling stands in conflict with a recent decision of the Seventh Circuit, where the court held that a discharge premised upon the employee's eligibility for service-related pension benefits (as distinct from benefits determined on the basis of age) did not violate the ADEA. *See Wheeldon* v. *Monon Corp.*, 946 F.2d 533 (7th Cir. 1992). In *Wheeldon*, the Seventh Circuit held that, in order to prevail on a claim that an employer's consideration of economic factors violated the ADEA, "the plaintiff must show that the economic factor relied upon by the employer operates as a proxy for age. Although pensions may be used as a proxy for age, we decline to rule that pension considerations always operate as such. Instead, the use of pensions as a proxy for age should be examined on a case-by-case basis." *Wheeldon*, 946 F.2d at 536 (footnote omitted) (rejecting correlation between pension status and age, and affirming summary judgment against ADEA claim).

The error of the First Circuit's substitution of pension interference as a proxy for age bias under the ADEA (and the wisdom of the Seventh Circuit's more discerning approach) has been further demonstrated by two recent district court decisions. In *Pickering* v. *USX Corp.*, 758 F. Supp. 1460 (D. Utah 1990), the court rejected the precise theory of age discrimination upon which the First Circuit premised liability against the Hazens:

[24] It is, of course, well settled that an employee discharge motivated by considerations other than age — even improper ones — cannot violate the ADEA. *See, e.g., Visser* v. *Packer Engineering Associates, Inc.*, 924 F.2d 655, 658-59 (7th Cir. 1991) (["Plaintiff's] age, the fact that he incurred a loss of pension benefits when he was fired, the fact that he was replaced by a much younger man, the fact that he may have been fired for an unethical reason unrelated to his age — none of these facts is evidence of age discrimination"); *Villanueva* v. *Wellesley College*, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991) ("Nondiscriminatory motive is immaterial to a discrimination case; therefore, the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact") (affirming summary judgment).

"Plaintiff's protestations that age and pension eligibility are 'inexorably linked' are belied by the actual terms of the pension plan in this case. As is true of most pension plans, years of service — rather than age — is the primary factor in determining benefits eligibility. Absent some specific evidence of disparate treatment on the basis of age, the mere fact that older employees may have had more years of service than younger employees does not automatically convert the alleged pension benefits discrimination into age discrimination. A contrary holding would mean that virtually every discriminatory pension benefits denial in violation of ERISA section 510 would also constitute age discrimination. This court refuses to interpret the ADEA as a protection-broadening appendage to ERISA section 510. *See Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 109 S. Ct. 2854, 2867, 106 L. Ed.2d 134 (1989) (reasoning that the ADEA is not intended as an ERISA surrogate for protecting pension benefit rights)."

Pickering, 758 F. Supp. at 1462 (citation omitted). *Accord Harvey* v. *I.T.W., Inc.*, 672 F. Supp. 973, 975 (W.D. Ky. 1987) ("Even assuming *arguendo* the defendants terminated [plaintiff] to prevent his pension rights from fully vesting, this would not be probative of age discrimination since it goes to tenure with the company, not age. A young person who has been with the company for a long time may very well be closer to a fully vested pension than an older person who just started work there recently."). *Cf. Visser* v. *Packer Engineering Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) ("Age and pension expense are correlated, though they are not the same thing. There is an analytical difference, certainly, between firing a person on the basis of a stereotyped view of older workers' energy, flexibility, initiative, and other employment attributes, and firing him to save money.") (dicta).[25]

[25] *But see White* v. *Westinghouse Electric Co.*, 862 F.2d 56, 62 (3d Cir. 1988) (discharge of employee motivated by desire to avoid increased benefits payable after 30 years' service violated the ADEA, because "such amounts are inextricably linked to an employee's years of service to the company and, hence, to his age"). The Third Circuit's decision in *White*, however, even if defensible on its own terms, is readily distinguished from the case at bar. In *White*, the pension benefits at issue were payable after *30* years' service, by definition making them available *only* to older employees in the protected class. A ten-year pension vesting requirement, by contrast, may be satisfied by employees of *all* ages, thereby negating any intrinsic equivalence between benefits eligibility and advanced age.

b. The ADEA Is Concerned With Discrimination On The Basis Of Age, Not With Personnel Decisionmaking Which Involves Age Surrogates Such As Seniority Or Pension Status

In predicating ADEA liability on the Hazens' purported denial of non age-related pension benefits to Biggins, the First Circuit has plainly disregarded the intent of Congress. The ADEA's language, legislative history and overall structure — as implicitly recognized in the foregoing cases — reveal that Congress meant the statute to reach employment decisions affected by age-based bias and prejudice, *not* to prohibit broader categories of personnel decisionmaking which might involve age surrogates such as seniority or pension status.

The ADEA's overriding concern with age, by itself, is apparent in the statute's preamble, which provides that the purpose of the Act is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." *See* ADEA Preamble, 29 U.S.C. § 621(b). *See also* 113 Cong. Rec. 34,740 (1967) (Congress enacted the ADEA to remedy the harms older workers suffer from pervasive employer misconceptions about the relationship of age to ability) (testimony of Representative Perkins). Age-focus is likewise evident in the ADEA's principal liability provision, which prohibits employment discrimination against any individual "*because* of such individual's *age*." 29 U.S.C. § 623(a)(1) (emphasis supplied). *See also* 29 C.F.R. § 860.103(c) (1991) ("The clear

purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.").

Nowhere do the terms of the ADEA evince any indication that the proscriptions of the statute were meant to extend beyond an employer's age-driven decisionmaking to reach personnel actions based on pension status or length of service. Indeed, key provisions of the Act and its legislative history belie such an intent. With respect to regulation of pension plans, the ADEA provides that "in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age" shall be unlawful. *See* 29 U.S.C. § 623(i)(1)(A).[26] In an attempt to foreclose the very type of logical error committed by the First Circuit, however, the ADEA further provides that the prohibition against age-based benefits distinctions does not

> "prohibit an employer . . . from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan."

See 29 U.S.C. § 623(i)(2). The First Circuit's stated rationale for sustaining ADEA liability in this case, *i.e.*, that an intent to interfere with pension rights which vest on the basis of years of service is tantamount to age discrimination, is thus clearly in-

[26] It is clear that the ADEA does not in terms prohibit the denial of pension benefits for reasons *unrelated* to age. Such a proscription is contained in Section 510 of ERISA, 29 U.S.C. § 1140, which specifically prohibits employers from discharging employees for the purpose of interfering with their attainment of pension rights. *See, e.g., Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988).

compatible with the Congressional intent to exempt seniority-based benefits decisions from the statute's coverage.[27]

c. The Availability Of An ERISA Remedy For Pension Interference Militates Against Construing The ADEA To Reach Such Conduct

That Congress did not intend the ADEA to be stretched to govern employer conduct interfering with non age-related pension vesting is further revealed in ERISA's explicit remedies for such conduct. *See* ERISA section 510, 88 Stat. 895, 29

[27] Numerous courts have, in contrast to the First Circuit, appropriately recognized the distinction between age and seniority level when applying the ADEA's liability provisions. *See, e.g., Williams* v. *General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) ("[S]eniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status. This is borne out, to be sure, by the simple observation that a 35-year old employee might have more seniority than a 55-year old employee"). *Accord, Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1087 (3d Cir. 1992) (ADEA does not protect employee from adverse employment decision based on seniority "if it cannot be demonstrated that chronological age was a factor"); *EEOC* v. *Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992) (same); *Christensen* v. *Equitable Life Assurance Soc'y*, 767 F.2d 340, 344 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (employee's loss of pension benefits not itself evidence of age discrimination: "In the absence of any showing that [defendant] has a policy of terminating older employees in order to save on pension payments, [plaintiff's] evidence fell far short of the substantial character needed to establish purposeful age discrimination"); *Finnegan* v. *Trans World Airlines, Inc.*, 767 F. Supp. 867 (N.D. Ill. 1991), *aff'd*, ___ F.2d ___, 1992 WL 161052 (7th Cir. July 14, 1992) (employer's cap on annual vacation accrual rate based on years of service provided no basis for ADEA liability, even though the limitation correlated with age); *Arnold* v. *United States Postal Service*, 649 F. Supp. 676, 683 (D.D.C. 1986) ("Discrimination on the basis of seniority ... is not, on its face, discrimination on the basis of age. As plaintiffs admit, no court has expressly held that seniority is inherently related to age"). Indeed, prior to this case, even the First Circuit distinguished employment decisions based on age from those based on considerations arguably correlated with age. *See Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ("the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health").

U.S.C. § 1140 (1974) (making it unlawful to discharge any person from employment "for the purpose of interfering with the attainment of any right to which such [person] may become entitled under [an employee pension plan]"). This Court has indicated its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA," *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985), and has likewise suggested that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 97 (1981).

This Court applied this principle on directly analogous facts in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, a plaintiff claiming race discrimination attempted to extend the coverage of section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (prohibiting discrimination in the "making and enforcement of contracts"), to reach on-the-job racial harassment clearly prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. After acknowledging that there was "some necessary overlap between Title VII and § 1981," the Court stated:

> "We should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute. That egregious racial harassment of employees is forbidden by a clearly applicable law (Title VII), moreover, should lessen the temptation for this Court to twist the interpretation of another statute (§ 1981) to cover the same conduct. . . . [T]he availability of the latter statute should deter us from a tortuous construction of the former statute to cover this type of claim."

Patterson, 491 U.S. at 181 (citations omitted).

Respondent here seeks to do precisely what this Court said was inappropriate in *Patterson* — namely, to stretch the coverage of an earlier statute (ADEA) to reach employer conduct that

is clearly proscribed by a later one (ERISA). This is wrong. Congress has in ERISA enacted a comprehensive remedial scheme intended to penalize employer attempts to frustrate employee benefit rights. Applying the foregoing principle of *Patterson*, there is no reason in law or logic for courts to engraft onto the ADEA a regulatory provision already spelled out in detail by ERISA — particularly in cases where, as here, the ERISA remedy was successfully invoked and obtained by the employee.[18]

In sum, the decision of the Court of Appeals to allow pension status to serve as a stand-in for "age" when applying the ADEA contravenes the logic, language and legislative intent of the statute. At the same time, the First Circuit's decision to treat seniority-based pension eligibility as a proxy for age departs from the strong consensus of federal courts on this issue, and improperly broadens the ADEA to reach employer conduct already regulated under section 510 of ERISA. For these reasons, even if the evidence at trial permitted the inference that Petitioners discharged Biggins from employment in order to interfere with his pension vesting, such an inference still cannot properly serve as the basis for ADEA liability.

II. The District Court Properly Struck The Award Of Liquidated Damages Because There Was No Evidence That Petitioners' Violation Of The ADEA Was Willful Within The Meaning Of Section 7(b) Of The Act

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides that liquidated or double damages shall be payable "only in cases of willful violations of [the Act]." Thus, in order to recover liquidated damages, a plaintiff must prove both that the Act has been violated and that the violation was "willful" within the meaning of Section 7(b).

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[18] This conclusion finds further support in the remarks of the ADEA's primary legislative sponsor, who observed that "the age discrimination law should not be used as the place to fight the pension battle." *See Age Discrimination In Employment Act: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (testimony of Senator Javits).

In the present case, and for the reasons set forth *supra*, there was no probative evidence that Petitioners committed any violation of the ADEA at all. Even if there were such evidence, however, there was certainly no probative evidence that the violation was "willful" within the meaning of Section 7(b). For each of these reasons, the District Court's entry of judgment notwithstanding the verdict on Respondent's claim for liquidated damages was correct as a matter of law, and should be reinstated by this Court.

A. To Recover Liquidated Damages In A Discriminatory Treatment Case, Plaintiff Must Show Both That Defendant Knew Or Displayed Reckless Disregard That Its Conduct Violated The ADEA, And That Defendant's Actions Further Warrant The Imposition Of Punitive Sanctions

This Court has recognized that "willful" is a word of varying definition, and should be construed according to the context in which it is used. For example, in *Spies* v. *United States*, 317 U.S. 492, 497 (1943), the Court described "willful" as a word "of many meanings, its construction often being influenced by its context." More recently, in *United States* v. *Bishop*, 412 U.S. 346, 356 (1973), the Court stated that "[w]e continue to recognize that context is important in the quest for [willful's] meaning." *See also United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933) (recognizing that "willful" can have many different meanings depending on the context in which it is used); Working Papers, *National Comm. on Reform Of Federal Criminal Laws*, 128 (1976) ("[t]here may be no word in the federal criminal lexicon which has caused as much confusion as the word 'willfully' (or 'willful')").

1. The Term "Willful" Must Be Construed Consistently With The Punitive Purpose of Liquidated Damages

In *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), this Court construed the term "willful" as used in Section 7(b)

of the ADEA in light of the structure and legislative history of the statute. The Court concluded that, since Congress plainly intended ADEA liquidated damages to be "punitive in nature" and available only in a limited number of cases,[29] the term "willful" should be interpreted to require, at a minimum, proof that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 469 U.S. at 128-29.[30].

In reaching this result, the Court rejected the prior decisions of some circuits that a willful violation exists whenever an employer has committed age discrimination with an awareness of the ADEA and its potential applicability to the employment decision at hand. The Court reasoned that, because the ADEA requires employers to post notices informing employees of their rights under the Act, *see* 29 U.S.C. § 627, so broad a construction of willfulness would lead to "an award of double damages

[29] The ADEA's legislative history confirms that the liquidated damages remedy was punitive in purpose. *See, e.g.*, 113 Cong. Rec. 7076 (1967) (testimony of Senator Javits). *See generally*, Charland, *Willfulness, Good Faith, and the Quagmire of Liquidated Damages Under the Age Discrimination in Employment Act*, 13 J. Corp. Law 573, 585-86 (1988) (reviewing legislative history of ADEA and concluding that "liquidated damages were meant to be punitive"). Even before *Thurston*, federal courts generally interpreted the willfulness requirement of Section 7(b) as a prescription for punitive damages. *See, e.g.*, *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981) ("the award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA"); *Dean* v. *American Sec. Ins. Co.*, 559 F.2d 1036, 1040 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) ("liquidated damages . . . effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve"); *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("If the employer's conduct has been such as to merit punitive treatment, then he is to be penalized by doubling the award").

[30] This Court has since reaffirmed the *Thurston* definition of willfulness in a case decided under the Fair Labor Standards Act, 29 U.S.C. § 216, the statute whose remedial provisions served as the model for ADEA Section 7(b). *See McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("The standard of willfulness that was adopted in *Thurston* — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act").

in almost every case" — a result at variance with Congress's clear intent to create a two-tiered liability scheme. *Thurston*, 469 U.S. at 128. The Court stated: "Both the legislative history and the structure of the statute show that Congress intended a two-tier liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent." *Id.* at 128.

2. The *Thurston* Test For Liquidated Damages Cannot Properly Be Applied To Individual Discriminatory Treatment Claims

Thurston, in contrast to this case, did not concern a claim of individual discriminatory treatment. Rather, like the typical disparate impact case, *Thurston* involved a company-wide plan or policy that adversely affected an older segment of the employer's work force. Since *Thurston*, federal courts have struggled to apply the "knew or showed reckless disregard" standard to cases involving individual discriminatory treatment claims.[31] The difficulty arises because, in discriminatory treatment cases, a finding of predicate liability necessarily requires a finding of discriminatory intent. *See Texas Dep't. of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981) (plaintiff bears the "ultimate burden of persuading the court that she has been the victim of intentional discrimination"); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (under ADEA, "the ultimate question is . . . whether it [employer's action] was unlawfully motivated"); *Cowen* v. *Standard Brands, Inc.*, 572 F.Supp. 1576, 1580 (N.D. Ala. 1983) ("In a disparate treatment case . . . [precedent] require[s] an ultimate showing of an intent

[31] Discriminatory treatment cases involve claims that the employer acted against a particular employee because of his age, whereas disparate impact cases involve claims that the employer implemented a policy, neutral on its face, which fell more harshly on older employees. Proof of discriminatory motive is essential in discriminatory treatment actions, but is not required in disparate impact cases. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). *See generally* M. Player, *Employment Discrimination Law* 356, 809 (1988).

to discriminate, and that any articulated non-discriminatory reason necessarily is a pretext"). Accordingly, and as the District Court below recognized, *see* Cert. Pet. A-57 – A-59, a rigid application of *Thurston* to discriminatory treatment claims will inexorably lead to double damages in almost every case. *See Wheeler* v. *McKinley Enterprises*, 937 F.2d 1158, 1163 (6th Cir. 1991) ("The courts have had some difficulty in finding a definition of 'willfulness' that allows for the award of double damages where appropriate, but does not result in double damages being awarded as a matter of course whenever an employee is discharged or otherwise discriminated against because of his age. It is clear that Congress did not intend that double damages be awarded automatically whenever a violation of the ADEA occurs."); *Lindsey* v. *American Cast Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987) ("We find the knowing or reckless disregard standard difficult to reconcile with the admonition to avoid imposing liquidated damages in every case, at least in the context of disparate treatment cases"). *See also* Note, *Liquidated Damages and Statute of Limitations Under the "Willful" Standard of the Fair Labor Standards Act and Age Discrimination in Employment Act: Repercussions of Trans World Airlines, Inc.* v. *Thurston*, 24 Washburn L.J. 516, 520 n.45 (1985) ("Where proof of the employer's state of mind is required on the liability issue, it is difficult for an employer to escape a 'willful' determination. In other words, if the jury finds the employer intentionally discriminated against the employee on the basis of age, it will automatically follow that such actions were 'willful' for the purposes of liquidated damages.").

One commentator has analyzed the dilemma of applying the *Thurston* formula — developed to address a disparate impact claim — to individual discriminatory treatment cases in the following way:

> "*Thurston* was a case involving company policy which affected employees as a group. As a result, subsequent courts have categorized it as a disparate impact case. Several courts have discovered that when *Thurston* is applied in

disparate treatment cases, a finding that age was a determinative factor in the employer's decision is also a finding of 'willfulness' in almost every case. This result occurs for two reasons. First, the ADEA's requirement that covered employers post notices about the ADEA in their workplaces makes it impossible for an employer to show that he or she did not know that the ADEA was potentially applicable. Second, a finding that age was a determining factor in the employer's decision makes *Thurston*'s 'good faith' defense unavailable to an employer since one cannot be found to have *intentionally* discriminated against an individual in *good faith*.

This problem does not arise in disparate impact/company policy cases such as *Thurston*. In those cases, the factfinder looks at the employer's decision regarding an employment policy and determines whether the employer 'knew or showed reckless disregard' for the matter of whether its policy violated the ADEA, or whether, after considering potential ADEA applicability, the employer decided in good faith that the policy did not violate the Act."

See Cluxton-Kremer, *Redefining "Willful" in the Liquidated Damages Provision of the Age Discrimination in Employment Act: The Tenth Circuit's Approach*, 68 Denv. U.L. Rev. 485, 495-96 (1991) (footnotes omitted).

As the foregoing courts and commentators have recognized, a definition of willfulness that guarantees the imposition of liquidated damages in every discriminatory treatment case plainly disserves the punitive purposes of Section 7(b). Indeed, such a standard is flatly inconsistent with this Court's admonition in *Thurston* that liquidated damages should be available only in a limited number of cases. Thus, in individual discriminatory treatment cases such as the present one, a more refined and differentiating standard of willfulness is required.

3. The Majority Of Courts Applying ADEA Section 7(b) To Discriminatory Treatment Claims Require The Evidence Of Liability To Meet A Higher Standard Of Outrageous Or Egregious Conduct

Since *Thurston*, seven federal circuits have held that a higher standard must be met before liquidated damages can be awarded in a discriminatory treatment case. Thus, the Third Circuit has required ADEA plaintiffs to establish "some additional evidence of outrageous conduct" to warrant the imposition of liquidated damages. *See Dreyer* v. *ARCO Chemical Co.*, 801 F.2d 651, 658 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Similarly, the Fifth Circuit requires evidence of "egregious" actions beyond ordinary age discrimination to permit the assessment of liquidated damages. *See Hansard* v. *Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989).

Echoing the "outrageous" and "egregious" tests for distinguishing ordinary violations of the ADEA from "willful" ones, the Sixth and Tenth Circuits have held that a plaintiff may recover liquidated damages only if he proves that age was the "predominant factor" in the employer's discharge decision. *See Schrand* v. *Pacific Electric Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).[31]

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[31] The Court of Appeals below misread these cases when it stated that "[i]n this circuit, the 'determining factor' ingredient added by the Sixth and Tenth Circuits to the *Thurston* standard for proof of a 'willful' violation of ADEA in disparate treatment cases is already a basic requirement for proof of the underlying ADEA violation itself." *See* Cert. Pet. A-20. This assertion is wrong in two significant respects. First, the requirement that unlawful consideration of age be a "determining factor" to permit predicate ADEA liability is not a requirement particular to the First Circuit, but is rather a basic element of causation applied in all discrimination cases. *See Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989); *Texas Dep't. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). More importantly, the willfulness standard adopted by the Sixth and Tenth Circuits is not a restatement of the statute's basic "determining factor" test. To the contrary, these courts hold that, not only must age be a consideration that makes a difference in the employer's decision (*i.e.*, a "determinative" or "determining" factor); it must further be the *predominant* factor in the decision. *See, e.g., Cooper*, 836 F.2d at 1551 (distinguishing

Finally, the Fourth, Seventh and Eighth Circuits — while eschewing precise verbal formulations or tests — have all held that in order for a plaintiff in a discriminatory treatment case to prove willfulness, he must introduce a greater quantum of evidence than that required for underlying ADEA liability. *See Aungst* v. *Westinghouse Electric Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991) (to prove willfulness, a plaintiff "must provide evidence beyond that which would prove an ordinary claim of age discrimination"); *Neufeld* v. *Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (construing willfulness to require "direct evidence — more than just an inference from, say, an arguably pretextual justification — of age-based animus"); *Gilliam* v. *Armtex Inc.*, 820 F.2d 1387, 1390-91 (4th Cir. 1987) (stating that evidence of age discrimination that is "too thin" will not sustain liquidated damages). *See also EEOC* v. *District of Columbia Dep't of Human Services*, 729 F. Supp. 907, 917 (D.D.C. 1990), *vacated without op.*, 925 F.2d 488 (D.C. Cir. 1991) ("some evidence in excess of that necessary to establish a violation [of the ADEA] is needed to support a finding of willfulness").

Although the seven circuits and one district court cited above have identified different factors which, in their view, would warrant an award of liquidated damages under Section 7(b), all agree that something more must be shown than that the employer simply knew or displayed reckless disregard that its conduct violated the ADEA.[33] The consensus of these courts ap-

"determining" factor from "predominant" factor: "Under the standard we adopt today, a basic finding of liability under the Act requires that age be at least one of the possibly several 'determinative factors' in the employer's conduct; for a willful violation to exist in a disparate treatment claim, a factfinder must find that age was the *predominant* factor in the employer's decision.") (emphasis in original).

[33] Even circuits that have purported to adhere strictly to the language of *Thurston* when evaluating claims for liquidated damages under Section 7(b) have acknowledged the need to distinguish ordinary from willful ADEA violations in the governing standard. *See Benjamin* v. *United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989) (applying *Thurston's* "knew or showed reckless disregard" standard, but observing "that 'willfulness' is most easily understood when the term is analyzed along a continuum", and attempting

pears to be that the employer's conduct must in some *further* sense have been outrageous or egregious, such as where age is not merely one motive but the sole or predominant motive for the employer's action, or, alternatively, where the employer has routinely or repeatedly discriminated against older persons through a pattern of oppressive treatment.

4. A Higher Standard Of Willfulness For Discriminatory Treatment Actions Fulfills Congress's Intent That Liquidated Damages Be A Punitive Remedy Reserved For Exceptional Cases

The foregoing appellate decisions are plainly correct because, once again, application of the "knew or showed reckless disregard" standard alone would lead to an automatic doubling of damages in almost every successful discriminatory treatment case brought under the ADEA — a result contrary to the explicit Congressional intent recognized by the Court in *Thurston*. The Court of Appeals below acknowledged as much, but thought itself bound to reach this inappropriate result "at least until either Congress or the Supreme Court changes the definition of willfulness." *See* Cert. Pet. A-20. The First Circuit failed to discern, however, that "willful" is not an inflexible term and, depending on the context in which it is used, may properly import the kind of egregious behavior required by the courts referred to above. *See generally* Senate Comm. on the Judiciary, *Report on Criminal Code Reform Act of 1979*, S. Rep. No. 96-553, 96th Cong., 2d Sess. 59 (1980) ("The courts have defined a 'willful' act as an act done voluntarily as distinguished from accidentally, an act done with specific intent to violate the law, an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, an act done without grounds for believing it is

to define certain classes of predicate ADEA violations that will not permit the award of liquidated damages); *Formby* v. *Farmers and Merchants Bank*, 904 F.2d 627, 631-32 (11th Cir. 1990) (applying *Thurston*, but noting that "[t]o ensure that a separation exists between [ordinary and willful] liability, we have recognized that a showing that an employer engaged in intentional age discrimination does not automatically entitle a plaintiff to receive liquidated damages").

lawful, and an act done with careless disregard whether or not one has the right so to act.").[34]

The circuit decisions which place an interpretive gloss on *Thurston* in individual disparate treatment cases also fulfill the Congressional purpose that liquidated damages be punitive in nature. "Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's conduct was *especially reprehensible.*" *Pacific Mutual Life Insurance Co.* v. *Haslip*, ___ U.S. ___, 111 S. Ct. 1032, 1062 (1991) (O'Connor J., dissenting) (emphasis added). *See also Day* v. *Woodworth*, 55 U.S. (13 How.) 363, 371 (1852) ("It is a well-established principle of the common law that ... a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view *the enormity of his offence* rather than the measure of compensation to the plaintiff"); American College of Trial Lawyers, *Report On Punitive Damages Of The Committee On Special Problems In The Administration Of Justice* 13 (1989) ("In addition to requiring knowledge, the instruction to the jury should state that punitive awards are to be made only in those cases in which it is established that the tortfeasor acted in a particularly egregious manner."). At least in the context of a statute typically requiring an intent to discriminate as a predicate to basic liability, the "knew or showed reckless disregard" standard is inadequate, by itself, to delineate those circumstances in which the defendant's misconduct is "especially reprehensible" so as to warrant punitive sanction. *See* Cluxton-Kremer, *supra* at 504 (arguing for differentiated standard of

[34] In this regard, it is important to note that the Court's approval of the "knew or showed reckless disregard" standard in *Thurston* as "reasonable" and "acceptable" in a disparate impact action, *see* 469 U.S. at 129, by no means forecloses its articulation of a different standard for willfulness in the context of a different type of discrimination case. "The Court [in *Thurston*] confined its holding to a relatively narrow point. It rejected some expounded definitions ... but did not render a blanket rejection of all possible definitions of willful." Charland, *Willfulness, Good Faith, and the Quagmire of Liquidated Damages Under the Age Discrimination in Employment Act*, 13 J. Corp. Law 573, 596 (1988).

willfulness in discriminatory treatment and disparate impact cases: "A single uniform standard for both types of cases will result in automatic liquidated damages assessments in disparate treatment cases since intent is required for a basic finding of liability").

For this reason, the better view of federal courts applying Section 7(b) of the ADEA to individual disparate treatment claims is to require the plaintiff to demonstrate something more in the way of reprehensible conduct by the employer than that sufficient to permit an inference of ordinary age discrimination. This requirement both preserves the Congressional intent of maintaining distinct tiers of predicate and willful ADEA liability, and is consistent with the view taken by numerous courts that punitive damages should be reserved for exceptional cases.

For example, under the Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. § 1981, which prohibits race discrimination in connection with the making and enforcement of contracts, a finding of intentional discrimination has been held insufficient to allow for punitive damages in the absence of further evidence of particularly egregious conduct. Thus, in *Stephens* v. *South Atlantic Canners, Inc.*, 848 F.2d 484 (4th Cir.), *cert. denied*, 488 U.S. 966 (1988), the court stated that section 1981's punitive sanction "is an extraordinary remedy *and is designed to punish and deter particularly egregious conduct*. Although any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit under section 1981 calls for submission of this extraordinary remedy to a jury." *Id.* at 489-90 (striking punitive damages notwithstanding jury's finding of predicate discrimination liability) (emphasis added). *Accord*, *Ramsey* v. *American Air Filter Co.*, 772 F.2d 1303, 1314 (7th Cir. 1985) ("In a section 1981 action, a finding of liability for discrimination against a defendant does not automatically entitle the prevailing plaintiff to an award of punitive damages"; "Although a punitive damage award may be appropriate in some cases to punish a wrongdoer for his or her outrageous conduct ... such award must be supported by the record"); *Lindsey* v. *Angelica Corp.*, 508 F. Supp. 363, 366-67 (E.D. Mo. 1981) (finding that while employer's "proffered

justification [for plaintiff's rejection] [was] merely a pretext for illicit discrimination," the "[d]efendant's actions were not malicious or in willful derogation of plaintiff's rights" so as to justify punitive damages); *Darensbourg* v. *Dufrene*, 460 F. Supp. 662, 665 (E.D. La. 1978) (same). *Cf. Adickes* v. *Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring in part and dissenting in part) ("To recover punitive damages, I believe a plaintiff must show more than a bare violation of § 1983").[35]

For the foregoing reasons, this Court should adopt the reasoning embraced by the majority of circuits that have addressed the question of liquidated damages in individual discriminatory treatment cases. In such cases, to recover double damages under Section 7(b) of the ADEA, a plaintiff must show both that his employer knew or showed reckless disregard that its conduct violated the statute, and further that the employer's actions were repeated, without colorable justification, or were otherwise harsh, egregious or outrageous. Requiring such proof

[35] The principle that, in cases where improper intent is part and parcel of the underlying violation, a further showing of egregious or aggravated misconduct is required to subject the defendant to punitive damages finds further support in common law decisions. In *O'Brien* v. *State Street Bank & Trust Co.*, 82 Ill. App.3d 83, 401 N.E.2d 1356 (Ill. App. 1980), for example, the court stated:

> "Punitive damages are awarded to punish and deter because of aggravated misconduct on the part of the defendant. However, *punitive damages should not be awarded if the defendant's misconduct is not above and beyond the conduct needed for the basis of the action*. If the plaintiff proves sufficiently serious misconduct that warrants punitive damages, the question of whether or not to award them is left to the jury. But it is for the trial court, in the first place, to say whether the plaintiff has proved misconduct aggravated enough to present the issue of punitive damages to the jury."

O'Brien, 401 N.E.2d at 1359 (emphasis added). *See also Sit-Set, A.G.* v. *Universal Jet Exchange, Inc.*, 747 F.2d 921, 928 (4th Cir. 1984) ("even in respect of tort claims having as essential elements 'fraudulent,' or 'false,' or 'malicious' states of mind, Virginia does not permit recovery of punitive damages except upon proof of a degree of aggravation in the critical state of mind above the threshold level required to establish liability for compensatory relief").

to establish willfulness in disparate treatment actions fulfills the Congressional intent of two-tiered ADEA liability, and properly reserves punitive damages for those cases involving the most flagrant violations of the law.

B. There Was No Probative Evidence Warranting An Award of Liquidated Damages In This Case

Applying any reasonable definition of the term, there was no probative evidence that Petitioners committed a "willful" violation of the ADEA in their decision to terminate Biggins' employment. There was no evidence that Petitioners engaged in a pattern of discriminatory behavior toward older workers; nor was there evidence that Biggins was singled out for particularly harsh or oppressive treatment for reasons relating to his age. Indeed, as set forth *supra*, the evidence permits no inference that the Hazens took *any* actions against Respondent because of his age.

The most the evidence showed was that Petitioners, after discovering that Biggins was marketing the services of another company to Hazen Paper competitors, asked him to sign a confidentiality and non-competition agreement. Given Respondent's sensitive position as both Hazen Paper's Technical Director and a member of its Executive Committee, such conduct was hardly exteme or outrageous, nor was it "especially reprehensible" so as to warrant particular punishment and deterrence. *See Dreyer* v. *ARCO Chemical Co.*, 801 F.2d 651, 658 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); *Hansard* v. *Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989).[36]

By his own admission, Biggins refused to sign the proffered confidentiality agreement *not* because he believed its terms were unduly harsh or unreasonable, but rather because Petitioners refused to accede to his demand that Hazen Paper

[36] To the extent the evidence showed anything else at all, it simply demonstrated a recurring conflict between employer and employee over appropriate compensation and purportedly promised stock benefits — matters that by any standard are unexceptional in the typical labor-management relationship.

pay him $100,000 per year in salary or Company stock. (J.A. 86-87.) Faced with Respondent's rejection of a confidentiality agreement in the absence of additional remuneration, Petitioners offered Biggins a consulting arrangement that would have, among other things, secured his pension benefits. It was only after Biggins spurned this offer as well that the Hazens terminated his employment. Once again, even assuming that such conduct could somehow be construed as age discrimination, it was in *no* sense aggravated wrongdoing of so egregious a nature as to warrant the imposition of *punitive* damages under the heightened standard contemplated by Section 7(b).

C. Even An Unmodified Application of *Thurston* Will Not Justify An Award Of Liquidated Damages Against The Petitioners

As a final point, Petitioners submit that evidence of any blameworthy behavior on the part of the Hazens in this case is so totally lacking that even an undifferentiated application of *Thurston* cannot justify the assessment of liquidated damages. There is no colorable basis in the evidence that Petitioners "knew" their actions toward Biggins violated the ADEA, or that they acted with "reckless disregard of the requirements of the ADEA." *Thurston*, 469 U.S. at 130 (quotations omitted). The First Circuit's novel construction of ADEA liability (*viz.*, that Petitioners' alleged intent to deprive Biggins of his service-based pension rights constituted age discrimination) is clearly not manifest in the language of the statute. Indeed, for all of the reasons set forth above, the ADEA cannot fairly be read to support liability on the basis of such an intent. Nor is ADEA liability premised upon interference with age-indifferent pension rights supported by the cases. To the contrary, the preponderance of the case law holds that employment decisions based on so-called age "proxies" (such as pension status or seniority) cannot give rise to ADEA violations. *See supra* Part I(A)(2).

Given the lack of textual support in the statute for a predicate finding of age discrimination on the basis of pension interfer-

ence, and given the contrary decisions of several federal courts, the failure of two businessmen to divine the dubious grounds of liability settled on by the First Circuit can hardly amount to either a "knowing" violation or "reckless disregard" for whether their conduct violated the ADEA. An employer's incorrect but good faith belief that his actions comply with the statute clearly precludes the imposition of liquidated damages — even under the standard of willfulness approved in *Thurston*. *See McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988). *See also St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) ("reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication.") (applying "reckless disregard" standard to libel claim).

A finding of willfulness on the facts of this case, based solely on Thomas Hazen's testimony that "he was 'absolutely' aware that age discrimination was illegal," would in effect revive the "in the picture" test for liquidated damages expressly rejected by this Court in *Thurston*. *See Thurston*, 469 U.S. at 127-28 ("We are unpersuaded . . . that a violation of the Act is 'willful' if the employer simply knew of the potential applicability of the ADEA."). *See also McLaughlin* v. *Richland Shoe Co.*, 486 U.S. at 133 (defendant's statement that he knew FLSA existed and that it applied to his company did not satisfy the *Thurston* standard, where there was no indication that defendant knew that his particular actions violated the statute). Such a result would be both contrary to well-reasoned precedent, and unwise as a matter of policy.[37]

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[37] As the National Association of Manufacturers and Associated Industries of Massachusetts aptly remarked in their Brief of Amici Curiae to this Court (at p. 7), "since virtually every business person in the land knows that age discrimination is illegal, the First Circuit's test shields only liars or fools from double damages in ADEA cases." *See also McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (a standard of willfulness requiring no more than an awareness of the law "would seem to apply only to ignorant employers, surely not a state of affairs intended by Congress").

To uphold the jury's finding of willfulness here would visit burdensome punitive damages on a company that had no grounds to conclude — or even to suspect — that its conduct was prohibited by the ADEA. Thus, even if the ADEA is construed to require compensatory damages in these circumstances, punishment is certainly not appropriate. By the same token, the goal of deterrence embodied in Section 7(b) cannot possibly be served by assessing punitive damages against a defendant who neither knew nor had reason to know that its actions violated the ADEA.

In sum, the punitive remedy of liquidated damages is not warranted on the facts of this case. The evidence of record permits no reasonable inference that Petitioners terminated Biggins' employment either because of his age or for reasons related to his age. Even if such an inference could properly be drawn, the evidence is still insufficient to sustain a finding of willfulness under *any* rational definition of the term — including the one applied in *Thurston*.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals below should be reversed, and judgment should enter in favor of Petitioners on Respondent's claims under the ADEA.

Respectfully submitted,

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